NO. 85-140

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK AND JOHN AND MARY DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, JOINED BY THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, JOINED BY THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Robert Abrams, Attorney General of the State of New York, and John Van De Kamp, Attorney General of the State of California, submit this brief as *amici curiae* pursuant to Supreme Court Rule 36.4.

In *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981), the New York Court of Appeals held New York's criminal prohibition of consensual sodomy

unconstitutional on the grounds that it violated the rights of privacy and equal protection guaranteed by the Fourteenth Amendment. In *People v. Uplinger*, 58 N.Y.2d 936, 460 N.Y.S.2d 514 (1983), *cert. dismissed*, 467 U.S. 246 (1984), the same court struck down New York's penal statute prohibiting loitering for the purpose of engaging in consensual sodomy, holding that the State may not punish inoffensive conduct anticipatory to sexual acts conducted in private between consenting adults. These decisions are consistent with basic constitutional principles limiting the intrusion of the state into the intimate affairs of its citizens. They have also removed a legal stigma from a large segment of New York's population.

Pursuant to their responsibilities as chief legal officers of their states, N.Y. Exec. Law § 63 (McKinney 1982); Cal. Gov. Code § 12511; and their authority to protect the civil rights and liberties of their states' citizens, *amici* urge this Court to rule that the Georgia statute criminalizing sodomy, Ga. Code Ann. § 16-6-2 (1982), implicates the right of privacy secured by the due process clause of the Fourteenth Amendment and must serve a compelling state interest to withstand constitutional scrutiny. A contrary decision could undermine the New York Court of Appeals' decisions in *People v. Onofre* and *People v. Uplinger* and would create a significant danger to the rights of New York's citizens to engage in sexual intimacy in their homes free from governmental interference and official stigma.

STATEMENT OF THE CASE

Michael Hardwick was arrested by the Atlanta police on the charge that he had violated Ga. Code Ann. § 16-6-2* by committing sodomy with a consenting male adult in the bedroom of his own home. After a preliminary hearing in the state court, the State of Georgia determined not to prosecute unless further evidence developed.

Respondent Hardwick, together with John and Mary Doe, a married couple, instituted this action for an order declaring unconstitutional Georgia's criminal sodomy statute. Petitioner moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court dismissed the complaint as to the Does on the grounds that they lacked standing. It also dismissed Hardwick's claim, on the merits, relying on this Court's summary affirmance in *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976), *aff'g* 403 F.Supp. 1199 (E.D. Va. 1975).

All three plaintiffs appealed to the Court of Appeals for the Eleventh Circuit. *Hardwick v. Bowers*, 760 F.2d 1202, *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985). The Court of Appeals affirmed the district court's judgment dismissing the Does' claims for lack of standing. 760 F.2d at 1206-07. It reversed the dismissal of Hardwick's claims, finding that *Doe v. Commonwealth's Attorney* did not foreclose Hardwick's challenge to the statute, 760 F.2d at 1207-10, and that the statute implicated Hardwick's privacy interests, which it held were accorded substantive protection by the due process clause of the Fourteenth Amendment.

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* Ga. Code Ann. § 16-6-2 provides, *inter alia*:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another....
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one or more than 20 years....

760 F.2d at 1210-13. Accordingly, the Court of Appeals remanded the case to the district court with instructions that it consider whether the State has a compelling interest in regulating consensual sexual activity between adults occurring in the seclusion of the home and whether Georgia's statute is the most narrowly drawn means of safeguarding that interest. 760 F.2d at 1213.

SUMMARY OF ARGUMENT

This Court has long recognized that the Constitution protects the individual's independence in making important decisions concerning intimate relationships. The purpose of this right of privacy, consistent with other constitutional objectives, is to protect against governmental intervention in and regulation of the conduct of intimate relationships. The right of privacy is strongest when it involves consensual sexual activities of partners to an intimate relationship which are conducted in the home. It creates a barrier to governmental intrusion into the conduct of intimate relationships.

Intimate sexual conduct in the home is constitutionally distinguishable from public or commercial conduct. While a statute which proscribes certain public or commercial conduct may be sustained merely upon a showing that the conduct offends the sensibilities of the majority, a statute such as Georgia's, which reaches private and intimate sexual conduct, can be sustained only upon a demonstration that it serves a compelling state interest.

ARGUMENT

THE GEORGIA STATUTE CRIMINALIZING PRIVATE SEXUAL ACTS INTRUDES UPON PERSONAL PRIVACY AND CAN BE SUSTAINED ONLY UPON A DEMONSTRATION THAT IT IS NARROWLY DRAWN TO FURTHER A COMPELLING STATE INTEREST

This case presents the issue of whether a state may criminally punish consenting adults who, in the seclusion of the home, engage in sexual intimacies that the state regards to be immoral. The New York State and California Attorneys General respectfully submit that the Court of Appeals correctly decided that the Fourteenth Amendment requires that a statute that reaches conduct so intimate, even in the marital bedroom, must be narrowly drawn to serve a compelling state interest.

This Court has recognized that the Constitution protects "zones of privacy" that safeguard the individual's "interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). Nearly sixty years ago Justice Brandeis wrote eloquently of the right of privacy that is fundamental to American democracy:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Respect for certain zones of privacy is not of recent origin. The cardinal sanctity of the home was well accepted in pre-Revolutionary English statutes and common law. *See Payton v. New York*, 445 U.S. 573, 596-97 (1980). More than a century

before the American Revolution, Sir Edward Coke pronounced that "a man's house is his castle, and one's home is to every man the safest refuge," Coke, *Third Part of the Institutes of the Laws of England*, 162 (1644), repeating dicta from the King's bench in *Semayne's Case*, 5 Coke's Reports 91a, 91b, 77 Eng. Rep. 194, 195-96 (K.B. 1603), that "the House of every one is to him his Castle and Fortress, as well for his Defence against Injury and Violence, as for his Repose...." Contemporaneously, Parliament decreed, and Charles I agreed, that free citizens could not be "compelled to receive [soldiers] into their houses, and thereto to suffer them to sojourn...." *The Petition of Right*, 3 Charles I, c. I (1628).

Later, the English Parliament sought to finance the Seven Years' War against France (in America, the French and Indian War) by imposing customs duties on the American colonies and excise taxes in Britain, and the government collected duties and taxes by entering homes under the infamous Writs of Assistance. The colonists rebelled at these acts, Tuchman, *The March of Folly*, 131-32 (1984), while in Parliament William Pitt was inspired to his immortal statement of principle:

> The poorest man in his cottage may bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter – but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement!

Hansard, *Parliamentary History*: XV 1307.

It is familiar history that the Crown's abridgements of the sanctity of the home were a profound motivating cause of the American Revolution and of the Framers' determination to found a government of limited powers. *Boyd v. United States*, 116 U.S. 616, 625 (1886). The provisions of the Bill of Rights were written to limit federal power, though federal power was already limited as a power ceded in specifics only – to the extent that many thought a Bill of Rights unnecessary. *E.g.*, Hamilton, *Federalist Papers*, Number 84 (1788). The power of the states,

however, was not inherently limited. Therefore, in applying the Bill of Rights to the states through the Fourteenth Amendment, the judiciary has construed its provisions to operate as effectively against the general powers of the states as against the specific federal powers. "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

The constitutional right to be let alone, which has its origins in our common law traditions, *Poe v. Ullman*, 367 U.S. 497, 521, n.12 (1961) (Douglas, J., dissenting), as well as our Revolutionary experience, emanates from principles of limited government which are central to the Bill of Rights. Thus, this Court or individual Justices

> have found ... the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendment, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Boyd v. United States*, 116 U.S. 616 (1886); *see Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. at 484-485; in the Ninth Amendment, *id.*, at 386 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Roe v. Wade, 410 U.S. 113, 152 (1973).*

The Court has not placed any firm boundaries on this most basic right. *Carey v. Population Services, International*, 431 U.S. 678, 684-85 (1977). Instead, it has defined the right on a case-by-case basis in order to meet modern needs, exercising its judgment "upon interests of society pushing in opposite directions."

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* In *Roe v. Wade*, the Court concluded that the right of privacy is an element of liberty protected from state interference by the due process clause of the Fourteenth Amendment. 410 U.S. at 153.

Rochin v. California, 342 U.S. 165, 171 (1952). Thus, the right of privacy encompasses personal decisions relating to child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 267 U.S. 390 (1923); procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); contraception, *Carey v. Population Services, International*; *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); marriage, *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); family composition, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); abortion, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Roe v. Wade*; and the possession of obscene materials in the home, *Stanley v. Georgia*, 394 U.S. 557 (1969).

These decisions limit governmental intrusion into important private relationships, and imposition of governmental norms on individuals in matters concerning their intimate relationships. While the decisions in *Meyer* and *Pierce* establish that the due process clause protects a "private realm of family life which the state cannot enter", *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), they also stand for a broader principle. Under those decisions, a State may not act "to foster a homogeneous people", *Meyer v. Nebraska*, 262 U.S. at 402, or "to standardize its children", *Pierce v. Society of Sisters*, 268 U.S. at 535. Similarly, in *Moore v. City of East Cleveland*, the Court, while recognizing that it is the family through which "we inculcate and pass down many of our most cherished values, moral and cultural," held that the due process clause forbids the State from "standardizing its children – and its adults – by forcing all to live in certain narrowly defined family patterns." *Id.*, 431 U.S. at 504-06. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 843-44 (1977).

Recent decisions protecting the right to use and receive contraceptives, and to abortion, prevent the state from imposing a majority judgment that sanctions only those sexual intimacies that result in reproduction. When legislation prohibiting the use of contraceptives was struck down in *Griswold v. Connecticut* on the ground that it interfered with the marital relationship, "a relationship lying within the zone of privacy created by several

fundamental guarantees", 381 U.S. at 485, the Court recognized the right "to make decisions with respect to the consequence of sexual encounters and, necessarily, to have such encounters." *People v. Onofre*, 51 N.Y.2d at 487, 434 N.Y.S. 2d at 950. A majority of the members of this Court participating in *Eisenstadt v. Baird* agreed that the right to engage in non-procreative sexual activity could not be limited to those who had entered into a marriage relationship sanctified by the state:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. *See Stanley v. Georgia*, 394 U.S. 557 (1969).

405 U.S. at 453 (emphasis in original). *See Carey v. Population Services, International*, 431 U.S at 686-89; *Doe v. Duling*, 603 F. Supp. 960, 967 (E.D. Va. 1985) ("[T]he constitutional right to privacy extends to a single adult's decision whether to engage in sexual intercourse"). And *Roe v. Wade* and its progeny recognize that the right of privacy is broad enough to encompass the decision of an individual woman, married or not, to have an abortion, because the State should not be permitted to impose upon the individual the intimate associations of marriage and family by compelling her to bear a child.

The right of privacy, vigorously enforced by this Court as a barrier to state efforts to require uniformity in the development and conduct of intimate associations, prohibits the imposition of majoritarian views concerning whom or when we may marry, *Loving v. Virginia; Zablocki v. Redhail*; how we exercise our physical and emotional intimacies, *Griswold v. Connecticut; Stanley v. Georgia*; whether and when to bear a child, *City of Akron v. Akron Center for Reproductive Health; Roe v. Wade*; and what

ideas and values we pass on to our children, *Meyer v. Nebraska; Pierce v. Society of Sisters*. It shares a common purpose with the rights of speech and association protected by the First Amendment:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

Protection from governmental regulation of sexual conduct* is especially appropriate when that conduct occurs in the home. Given the pervasive Anglo-American legal, political and philosophical concern during the colonial period for the sanctity of the home, the founders of our Republic could not have contemplated a government with authority to reach into the home to regulate the conduct of intimate relationships. This Court so recognized in *Stanley v. Georgia*, permitting Stanley to possess and view in the privacy of his home materials that Georgia might forbid him to possess or view so freely elsewhere: "Whatever may be justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's home ...." 394 U.S. at 565. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973) (explaining *Stanley* as "a reaffirmation that 'a man's home is his

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* Numerous courts, in addition to the Court of Appeals for the Eleventh Circuit, have found that acts of sexual intimacy are entitled to protection from government regulation. *E.g.*, *Hatheway v. Secretary of Army*, 641 F.2d 1376, 1384 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981); *Beller v. Middendorf*, 632 F.2d 788, 807-10 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Cotner v. Henry*, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968); *Doe v. Duling*, 603 F.Supp. at 966-69; *Briggs v. North Muskegon Police Dept.*, 563 F.Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 3535 (1985); *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D. Tex. 1970), *vacated on other grounds*, 401 U.S. 989 (1971); *People v. Onofre*; *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977).

castle' "); *Griswold v. Connecticut*, 381 U.S. at 485-86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to notions of privacy"). The home, and especially the intimacy of sexual relations in the home, must be treated as a "zone of prima facie autonomy, of presumptive immunity from regulation...." Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410, 1425 (1974).

In short, private consensual sexual conduct, which implicates both the kinds of personal decisions previously protected by this Court and the protected zone of the home, is shielded by the right of privacy from governmental intrusion.* The presumption that sexual conduct in the home is immune from regulation is not easily overcome; the constitutional privacy and autonomy cases require a compelling state interest. *Roe v. Wade*, 410 U.S. at 155; *Eisenstadt v. Baird*, 405 U.S. at 463-64 (White, J., concurring). Close judicial scrutiny is especially appropriate to protect the privacy rights at issue here because of the "unreliability of the political process in regard to them." Henkin, 74 Colum. L. Rev. at 1429; *see Baker v.Carr*, 369 U.S. 186 (1962).**

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* Application of privacy protection to consensual adult sexual conduct in the home or similar place of seclusion will not undermine legislation regulating public or coercive sexual conduct. Public sexual conduct, even by consenting adults, regardless of their sex or marital status, is a legitimate subject of governmental regulation, *Paris Adult Theatre I v. Slaton*, 413 U.S. at 66, n.13; *see* Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L.Rev. 670, 725-26 (1973). Similarly, conduct involving physical harm or coercion may legitimately be proscribed by the state. *See Rose v. Locke*, 423 U.S. 48, 50, n.3 (1975).

** The experience of New York State is instructive. A blue-ribbon panel of legislators and constitutional scholars charged with re-codification of the New York Penal Law proposed a code which omitted the provisions that had criminalized consensual "sodomy" and "adultery." At subsequent public hearings, the panel unanimously defended the omissions against religious and moral attacks on the ground that such provisions invade "private morality" and serve "no salutary purpose." Proposed New York Penal Law, 343-44 (1964); 1965 New York State Legislative Annual 51-52; State Temporary Commission on the Revision of the Penal Law and Criminal Code, Hearings of November 23, 24, and

(footnote continued)

The State's desire to impose a standard of morality does not suffice. This is so because governmental intrusion into intimacies conducted in the home does not "advance the concept of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State." *People v. Onofre*, 51 N.Y.2d at 490, 434 N.Y.S.2d at 952. Neither the length of time that the majority has held its moral conviction nor the passion with which it has expressed it withdraw legislation enforcing it from this Court's scrutiny.* For, if those considerations required judicial restraint, laws implementing long and deeply held sentiments favoring criminalization of contraception or abortion, or, indeed, favoring racial segregation in marital relations or education would be immune from review under the Fourteenth Amendment. *See Griswold v. Connecticut; Roe v. Wade; Loving v. Virginia; Brown v. Board of Education*, 347 U.S. 483 (1954).**

25, 1964, 464-65, 642, 650, 652. In order to gain passage for the much needed code revision, New York's legislative leaders and Governor found it necessary to restore the omitted provisions, *see* N.Y. Penal Law §§ 130.38 (McKinney 1975), 255.17 (McKinney 1980), stating that they were doing so without regard to the "merits" of the reinstated provisions. 1965 New York Laws, chapters 1030, 1037 and 1038; 1965 New York Legislative Annual, 531. Judicial action, and strict scrutiny of the statutory sections, was necessary to eliminate them. *People v. Onofre*, 72 A.D.2d 268, 424 N.Y.S.2d 566 (4th Dept.), *aff'd*, 51 N.Y.2d 476, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

* In *Roe v. Wade* this Court acknowledged its "awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, ... and of the deep and seemingly absolute convictions that the subject inspires" but recognized that its task was "to resolve the issue by constitutional measurement, free of emotion and of predilection." 410 U.S. at 116.

** The New York Court of Appeals in *Onofre* noted the view that consensual sodomy is immoral and, as such, could be prohibited by the legislature. The court held, however, that morality in personal decision-making, when the outcome creates no harm to anyone, may not be legislated:

> We are not unmindful of the sensibilities of many persons who are deeply persuaded that consensual sodomy is evil and should be prohibited. That is not the issue before us. The issue before us is

(footnote continued)

The touchstone here is whether the intimate conduct is innocent of "demonstrated harm." *Baird v. Eisenstadt*, 429 F.2d 1398, 1402 (lst Cir. 1970), *aff'd*, 405 U.S. 438 (1972); Gerety, *Redefining Privacy*, 12 Harv.Civ.Rts.-Civ.Lib.L.Rev. 234, 274-78 (1977). This Court has recognized that the state's moral judgment may intrude upon the conduct of consenting adults only where the conduct "has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize the States' 'right to maintain a decent society.' " *Paris Adult Theatre I v. Slaton*, 434 U.S. at 69 *quoting Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, Ch. J., dissenting). The Georgia statute unselectively criminalizes and severely punishes not only the conduct involved here but other conduct widely regarded as innocent and engaged in by a substantial majority of Americans. *See* Kinsey, Pomeroy & Martin, *Sexual Behavior in the Human Male*, 371, 577 (1948); Kinsey, Pomeroy, Martin & Gebhard, *Sexual Behavior in the Human Female* 257-58, 588 (1953).* Enforcement of such a statute regulating intimate, consensual conduct in the home may breed contempt for the legitimacy of the law.

Recognition of privacy rights here will not preclude "closure of bathhouses and sexually facilitating bars and parks...." Brief of David Robinson, Jr., as Amicus Curiae in Support of Petitioner, 33-34. Treatment of public or commercial establishments which

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> whether, assuming that at least at present it is the will of the community (as expressed in legislative enactment) to prohibit consensual sodomy, the Federal Constitution permits recourse to the sanctions of the criminal law for the achievement of that objective. The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose.

51 N.Y.2d at 488, n. 3, 434 N.Y.S.2d at 951, n. 3.

* "[N]o legislation or social taboos have been able to eliminate [non-reproductive sexual conduct] from the history of the human animal." *Sexual Behavior in the Human Male*, at 578.

promote and profit by promiscuous, anonymous sexual activity is plainly distinguishable from regulation of consensual activity in private homes, both as a matter of constitutional privacy protection and as a matter of public health. *See, e.g.*, Sheretz, *Acquired Immune Deficiency Syndrome: A Perspective for the Medical Practitioner*, 69 Medical Clinics of North America 637 (1985) ("sexual promiscuity is probably the most important risk factor").* However, a statute that regulates sexual conduct in order to further public health interests should be narrowly drawn to further those interests. It is not likely that a statute that proscribes private, sexual conduct in a relationship of even the most enduring monogamy is one motivated by concern for the partners' or the public's health or safety. *See Carey v. Population Services, International*, 431 U.S. at 689-91; *Eisenstadt v. Baird*, 405 U.S. at 451-52.

Those who urge this Court to defer here, under the principles of "separation of powers" or "federalism", *see* Pet. Br. at 31, to the majoritarian judgment of state legislatures overlook the wisdom expressed by the Framers in adopting the Bill of Rights:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

West Virginia Board of Education v. Barnette, 319 U.S. at 638.

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* New York State, for instance, recognizes this distinction. *Compare People v. Onofre* (holding "noncommercial private" sexual activity to be protected) with *City of New York v. The New Saint Mark's Baths*, 1/8/86 N.Y.L.J., p. 6, col. 3 (Sup. Ct. N.Y. Co.) (unreported decision sustaining N.Y. Admin. Code Tit. 10, Subpart 24-2 (1985), which authorizes closure of public establishments in which "high risk sexual activity" is found to occur; relying on *Paris Adult Theatre I* in rejecting challenges based on *Griswold*, *Stanley* and *Onofre*.)

It is the vigilant protection of personal liberty that is the majority's will, for it has been the judgment of this Nation that the freedom of all can be retained only if individuals are secured from governmental intrusions into their intimacies. This majoritarian value became part of our constitutional ethic when the states adopted the command of the Fourteenth Amendment: "nor shall any State deprive any person ... of liberty ... without due process of law." The Attorneys General of New York and California respectfully submit that constitutional democracy is best served by requiring states to demonstrate that compelling reasons exist for intruding upon sexual intimacies in the home and that those reasons are served by regulations narrowly drawn.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

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